TIEW KUN

v.

TNEU SENG BEE & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDDIN SHAH JCA
ABDUL MALIK ISHAK JCA
JEFFREY TAN JCA
[CIVIL APPEAL NOS: W-02-711-2004 & W-02-715-2004]
8 JULY 2009

CIVIL PROCEDURE: *Judgments and orders - Interpretation of - Terms of court order - Whether clear and categorical - Whether sch. E part and parcel of court order*

These two appeals turned essentially on the construction or interpretation of the following order of court dated 18 July 1994 ('the said order') namely the action from which these two appeals emanated. The appeal record disclosed that pursuant to the said order, a certain amount of sum was deposited by the second and sixth defendants for Messrs Shearn Delamore & Co to hold as stakeholders. These monies were later claimed by the second and sixth defendants. Issue arose as to whether those monies were realized from the sale of a property that fell within the ambit of the said order. The stakeholders applied (*vide* encl. 117) to court to settle that issue. The senior assistant registrar held that those monies formed part of the trust properties listed in sch. E of the said order and therefore should be equally distributed in accordance with the terms of the said order. However, on appeal by the second and sixth defendants, the judge held that those monies were not realized from any property within the ambit of the said order and ordered the said monies to be released to the second and sixth defendants. Hence, these appeals by the plaintiff and by the third and fourth defendants. Finality of the said order was agreed but the terms of the said order were in dispute. It was contended by the appellants that the said monies were realized from the sale of a property listed in sch. E of the said order and should therefore be equally distributed. The respondents contended to the contrary.

Held (dismissing appeals)
Per Jeffrey Tan JCA delivering the judgment of the court:

(1) The said order only directed that the assets and properties listed in schs. A, B and C be equally distributed. Schedule E was not part of the said order. The terms of the said order was clear and categorical. The counterclaim was allowed, but only to the extent of the properties or assets listed in schs. A, B and C. Orders are extracted with the prior approval of parties. The draft order was approved by all solicitors concerned who had taken special care to put all their signatures on not only the final page, but on each and every page of the draft order. That evinced surely that each and every page of the draft order would have been carefully read by all, and that measures were adopted to ensure that the integrity of the draft order, as approved, would remain intact. Given so, it would not seem probable that so many trained eyes could have failed to notice that the said sch. E, which was a long list of seven assets and properties, was not mentioned and annexed to the said draft order. The examination of the appeal record confirmed that the said sch. E was consciously left out from the said order. Hence, the said sch. E was not part or parcel of the said order. (paras 5, 7, 8 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan-rayuan ini pada asasnya berdasarkan pentafsiran atau interpretasi perintah mahkamah bertarikh 18 Julai 1994 ('perintah tersebut'), iaitu kes dari mana datangnya kedua-dua rayuan ini. Rekod rayuan menunjukkan bahawa di bawah perintah tersebut, defendan kedua dan keenam telah mendepositkan jumlah wang tertentu kepada Messrs Shearn Delamore & Co untuk memegangnya sebagai pemegang amanah harta. Wang ini kemudiannya dituntut oleh defendan kedua dan keenam. Isu yang timbul adalah sama ada wang ini diperolehi dari jualan hartanah yang termasuk dalam rangkuman perintah tersebut. Pemegang amanah harta telah memohon (melalui lampiran 117) kepada mahkamah untuk menyelesaikan isu ini. Penolong kanan pendaftar memutuskan bahawa wang itu menjadi sebahagian harta amanah yang disenaraikan di dalam sch. E perintah mahkamah tersebut, oleh itu wang tersebut sepatutnya dibahagikan dan diedarkan mengikut terma-terma perintah mahkamah tersebut. Walau

bagaimanapun, atas rayuan defendan kedua dan keenam, hakim telah memutuskan bahawa wang tersebut tidak diperolehi dari jualan dari hartanah yang termasuk dalam rangkuman perintah mahkamah tersebut dan memerintah supaya wang tersebut dilepaskan kepada defendan kedua dan keenam. Justeru itu, plaintif serta defendan ketiga dan keempat membuat rayuan. Kemuktamadan perintah mahkamah tersebut dipersetujui tetapi terma-terma perintah mahkamah tersebut masih perlu dipertikaikan. Perayu-perayu telah membuat hujahan bahawa wang tersebut diperolehi oleh penjualan hartanah yang tersenarai di dalam sch. E perintah mahkamah tersebut dan sepatutnya dibahagikan. Pihak responden menentang hujahan perayu-perayu.

Diputuskan (menolak rayuan)
Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) Perintah mahkamah tersebut telah mengarahkan supaya aset - aset dan hartanah yang disenaraikan di dalam sch. A, B dan C dibahagikan sama rata. Schedule E bukan sebahagian dari perintah mahkamah tersebut. Terma-terma perintah mahkamah tersebut adalah jelas dan mutlak. Tuntutan balas telah dibenarkan, tetapi hanya setakat hartanah dan aset-aset yang disenaraikan dalam sch. A, B dan C. Perintah-perintah diesktrakkan dengan kebenaran terdahulu pihak-pihak yang terlibat. Deraf perintah mahkamah diberi kebenaran terdahulu oleh semua peguamcara-peguamcara yang telah mengambil masa dan tenaga untuk menandatangani bukan sahaja atas muka surat yang terakhir, tetapi juga atas setiap mukasurat-mukasurat deraf perintah mahkamah. Ini menunjukkan bahawa setiap mukasurat deraf perintah mahkamah tersebut telah diteliti dan dibaca oleh semua pihak, dan langkah-langkah telah diambil untuk memastikan integriti deraf perintah mahkamah tersebut, yang telah dibenarkan, dikekalkan. Oleh itu, adalah tidak mungkin semua mata-mata yang terlatih gagal mengambil perhatian bahawa sch.E tersebut, iaitu senarai yang panjang mengenai tujuh aset dan hartanah-hartanah, tidak disebut dan dilampirkan bersama dengan deraf perintah mahkamah tersebut. Pemeriksaan rekod rayuan mengesahkan bahawa sch. E tersebut telah dengan sengaja tidak dimasukkan ke dalam perintah mahkamah tersebut. Justeru itu, sch. E tersebut bukanlah sebahagian dari perintah mahkamah tersebut.

Case(s) referred to:
Brosseau v. Berthiaume [1993] OJ 532 ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***
Seth Manakchand v. Chaube Manoharlal & Anor AIR [1944] Privy Council 46 ***(refd)***

(Civil Appeal No: W-02-711-04)
For the appellant - Conrad Young; M/s Sreenevasan Young
For the 1st & 2nd respondents - Saranjit Singh; M/s Riza Leong & Partners
For 5th respondent - Yee Mei Ken; M/s Shearn Delamore & Co

(Civil Appeal No: W-02-715-04)
For the appellants - Andrew Chiew; M/s Lee Hishamuddin Allen & Gledhill
For the 1st, 2nd & 3rd respondents - Saranjit Singh; M/s Riza Leong & Partners
For 4th respondent - Yee Mei Ken; M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan JCA:

[1] In a word, these two appeals turned essentially on the construction or interpretation of the following order of court dated 18 July 1994 in Kuala Lumpur High Court Civil Suit No. D3-22-28-1992, namely the action from which these two appeals emanated.

Di Hadapan Yang Arif Puan Hakim Dato' Siti Norma Yaakob

Pada 18 Haribulan Julai, 1994 Di Mahkamah Terbuka

Perintah

Setelah Tindakan Ini dibicarakan pada 18 haribulan Mei, 1993 dan diteruskan pada 19 haribulan Mei, 1993, 9 haribulan September, 1993 hingga 24 haribulan September, 1993, 7 haribulan Oktober, 1993, 8 haribulan Oktober, 1993, 22 haribulan April, 1994 dan 6 haribulan Mei, 1994 Dan Setelah Mendengar keterangan lisan saksi-saksi dan keterangan dokumentari yang dikemukakan Dan Setelah Mendengar Encik KS Narayanan (Encik YK Leong dan Cik Preeti Kaur Boler bersamanya) peguam bagi Plaintif-Plaintif (melalui tindakan asal dan Defendan-Defendan Pertama hingga Keenam, Kesebelas dan Keduabelas melalui tuntutan balas) dan

Encik Robert Lazar (Cik Foo Yet Ngo bersamanya) peguam bagi Defendan-Defendan Pertama dan Kedua (melalui tindakan asal dan Plaintif melalui tuntutan balas) dan Encik DP Naban peguam bagi Defendan-Defendan Ketigabelas dan Keempatbelas melalui tuntutan balas) Adalah Diperiintahkan bahawa tindakan ini ditangguh untuk keputusan dan setelah tindakan ini dipanggil untuk keputusan pada 18 haribulan Julai, 1994 Adalah Diperintahkan bahawa:

(1) tuntutan Plaintif dibatalkan dengan kos;

(2) tuntutan balas Defendan-Defendan dibenarkan dengan kos dan bahawa segala harta yang disenaraikan dalam Jadual-Jadual A, B, C di dalam tuntutan balas dan dilampirkan di sini dan diperakui dibahagikan secara samarata antara Plaintif, Tneu Beh, Defendan Kedua, Tiew Kun @ Tiew Boon Eu, Defendan Ketiga, Tew Hon Liam @ Tiew Boon Beng, Defendan Keempat Tew Tian Lam @ Tneu Boon Seng dan bahawa harta-harta tersebut akan merangkumi:

(i) rumah lot B (Bahagian tanah yang dikenali sebagai Lot 2242 Lokaliti Tanjong Sepat New Village Mukim Batu, No. ML 146 Negeri Selangor) yang telah didaftarkan dalam nama Tneu Beh sebagai benefisiari tunggal estet Thean Cheng Kang @ Tiew Cheng Kang;

(ii) harta-harta lain, atau nilainya, yang telah dijual oleh mana-mana tiga orang adik lelaki;

(iii) segala syer yang dikeluarkan dan dibayar di dalam syarikat-syarikat yang dikenali sebagai Tanjong Kelapa Sawit Sdn Bhd dan Lumayan Plantations Sdn Bhd termasuk syer yang didaftarkan dalam nama-nama Tneu Beh dan ahli-ahli keluarga rapatnya;

(iv) 210,000 saham-saham Lumayan yang didaftarkan dalam nama Tanjong Kelapa Sawit Sdn Bhd.

(3) RM912,870-45 dibayar dari harta keluarga kepada Defendan Kedua, Tiew Kun @ Tiew Boon Eu, sebelum pembahagian dilaksanakan seperti yang dinyatakan dalam perenggan (2) di atas.

Bertarikh pada 18 haribulan Julai, 1994.

Timbalan Pendaftar,

Mahkamah Tinggi,

Kuala Lumpur.

[2] The Appeal Record disclosed that pursuant to the aforesaid Order dated 18 July 1994, a sum of RM23,000 and RM131,602.94 was deposited by the 2nd and 6th defendants to Messrs Shearn Delamore & Co to hold as stakeholders. Those monies were claimed later by the 2nd and 6th defendants. Issue arose as to whether those monies were realised from the sale of a property (71, Leboh Bagor, Klang, Selangor) that fell within the ambit of the aforesaid order dated 18 July 1994. Caught in a bind, the stakeholders applied (*vide* encl. 117) to court to settle that issue. The learned Senior Assistant Registrar held that those monies formed part of the trust properties listed in Schedule E of the said order dated 18 July 1994 and therefore should be equally distributed in accordance with the terms of the same said order dated 18 July 1994. However, on appeal by the 2nd and 6th defendants to judge-in-chambers, Zulkefli J, now FCJ, held that those monies were not realised from any property within the ambit of the said order dated 18 July 1994. Zulkefli J ordered the said monies to be released to the 2nd and 6th defendants. Hence these appeals, by the plaintiff (W-02-711-2004) and by the 3rd and 4th defendants (W-02-715-2004).

[3] Before us, all learned counsel (Mr Conrad Yeong for appellant in W-02-711-04; Mr Andrew Chew for appellants in W-02-715-04; Mr Saranjit Singh for 1st and 2nd respondents in W-02-711-04 and 1st, 2nd and 3rd respondents in W-02-715-04; and Mr Yee Mei Ken for 5th respondent in W-02-711-04 and 4th respondent in W-02-715-04) confirmed that the said order dated 18 July 1994 had been affirmed by the Court of Appeal, that leave to further appeal had been refused by the Federal Court, and that the order dated 18 July 1994 was final and conclusive.

[4] Finality of the said Order dated 18 July 1994 was agreed. But the terms of the said Order dated 18 July 1994 were in dispute. It was contended by the appellants that the said monies were realised from the sale of a property (71, Leboh Bagor, Klang, Selangor) listed in sch. E of the said Order dated 18 July 1994 and should therefore be equally distributed. On the other hand, it was contended by the respondents to the contrary. That called

upon us to read and interpret the said Order itself (see *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833 FC, where it was held by the Federal Court, per Chong Siew Fai CJ (Sabah & Sarawak) citing Sir George Rankin in *Seth Manakchand v. Chaube Manoharlal & Anor* AIR [1944] Privy Council 46, that "For the purpose of interpreting a decree no other document is so directly in point as the judgment or case in the nature of things have comparable force").

[5] The approach of a close scrutiny of the order or decree was similarly adopted by Zulkefli J who found that the said sch. E was not in the said order - "tidak termasuk dalam perintah tersebut". On our part, we also could not unearth the said sch. E from the said Order dated 18 July 1994, which only directed that the assets and properties listed in schs. A, B and C be equally distributed - "tuntutan balas defendan-defendan dibenarkan dengan kos dan bahawa segala harta yang disenaraikan dalan Jadual-Jadual A, B, C di dalam tuntutan balas dan dilampirkan di sisi dan diperakui dibahagikan secara samarata antara ..." Simply put, sch. E was not part of the said Order dated 18 July 1994.

[6] Nevertheless, it was contended by Mr. Conrad Yeong (Mr Andrew Chew adopted his submission) that the said sch. E was yet part and parcel of the said Order dated 18 July 1994. Learned counsel first drew our attention to the fact that the said sch. E was 'included' in the counterclaim and to the further fact that the counterclaim was allowed. Learned counsel argued that when the counterclaim was allowed, sch. E was also allowed in tandem.

[7] But with respect, we found that reasoning to be utterly flawed, for what was allowed in the said counterclaim must be construed from the terms of the said Order dated 18 July 1994 itself. "In accordance with the general rules of interpretation, the language used in a judgment or order must be construed according to its ordinary meaning and not in some unnatural or obscure sense" (*Brosseau v. Berthiaume* [1993] OJ 532). Unless there is ambiguity, it is the order or decree alone that settles the verdict of a court. In the instant case, we found the terms of the said Order dated 18 July 1994 to be absolutely clear and categorical. The counterclaim was allowed, but only to the extent of the

properties and or assets listed in schs. A, B, and C. And it would not appear to us that the said sch. E could have been inadvertently left out. Orders are extracted with the prior approval of parties. We observed that the draft order was approved by all solicitors concerned who had taken special care to put their signatures on not only the final page, but on each and every page of the draft order. That evinced surely that each and every page of the draft order would have been carefully read by all, and that measures were adopted to ensure that the integrity of the draft order, as approved, would remain intact. Given so, it would not seem probable that so many trained eyes could have failed to notice that the said sch. E, which was a long list of seven assets or properties, was not mentioned and annexed to the said draft order.

[8] Our examination of the appeal record only confirmed that the said schedule E was consciously left out from the said Order dated 18 July 1994. In the first place, as was correctly pointed out by Mr Saranjit Singh, the prayer for the assets and properties listed in sch. E was alternative to the prayer for the assets and properties listed in schs. A, B and C (see p. 320 of the Appeal Record). Hence, the order in the judgment (see p. 521 of the Appeal Record) "That the defendants' counterclaim be allowed with costs and that all the properties listed in schs. A, B and C be distributed equally between ... These properties include ..." (see p. 521 of the Appeal Record) was entirely at one with the prayers.

[9] In point of fact, it was fully appreciated by the instant appellant Tiew Kun that no order was made by Siti Norma J on the alternative prayer. Now, appeals and cross-appeals (W-02-5-94 and W-02-27-94) were lodged against the said Order dated 18 July 1994. In the case of the cross-appeal of the instant appellant Tiew Kun, he sought to vary the said Order dated 18 July 1994, *inter alia*, on the ground that the learned judge had omitted sch. E (see p. 668 of the Appeal Record):

> The learned Judge erred in law and/or in fact in totally omitting, overlooking or failing to consider sufficiently or at all the counterclaim in respect of the properties/assets/shares/interests of the family held in the names of ... as set out in Schedule E.

[10] Therefore, unquestionably, the appellant Tiew Kun knew that no order was made on sch. E. The Court of Appeal also understood the judgment of the High Court to be "that the properties listed in schs. A, B, and C in the counterclaims together with certain other specified properties be distributed equally between ..." (see p. 536 of the Appeal Record). In particular, in relation to the counterclaim of the appellants, Ahmad Fairuz JCA, as he then was, held as follows.

> As regards the Respondents' counterclaims, the judgment of the learned High Court Judge shows clearly that the learned Judge had based her decision on the same findings of fact highlighted above. Because of those findings of fact, the learned Judge directed that the properties in Schedules A, B, and C in the counterclaims be distributed equally between ...

[11] And in relation to those cross-appeals by the instant appellants, Ahmad Fairuz JCA pronounced as follows (see p. 551 of the Appeal Record):

> Consequently, prayers 1(a) and (b) of the cross-appeal ought to be dismissed. Prayer 1(c) of the cross-appeal of the 1st and 2nd respondents and prayer l(c) of the cross-appeal of the 3rd and 4th respondents ought to be dismissed ... Prayers 1(d) to (i) of the cross-appeal of the 1st and 2nd respondents and prayers 1(b) to (g) of the cross-appeal of the 3rd and 4th respondents too ought to be dismissed ...

[12] The Court of Appeal per Abdul Malek Ahmad JCA, as he then was, then shut all doors to any interpretation of its order in relation those appeals and cross-appeals (see p. 570 of the Appeal Record):

> Having evaluated the evidence, the learned trial judge finally made the following orders:
>
> (a) that the claims be dismissed with costs;
>
> (b) that the counterclaims be allowed with costs and that all the properties listed in Schedules A, B, and C therein be distributed equally between Tneu Beh, Boon Eu, Boon Beng and Boon Seng These properties include ...
>
> (c) ...

A Accordingly, we dismissed both the appeals with costs. As for the cross-appeals, we saw no reason to vary the learned trial judge's orders as prayed for in the counterclaims. They were also dismissed with costs.

B **[13]** It was so obviously irrefragable, that the said sch. E was not part or parcel of the said Order dated 18 July 1994. No wonder, Mr Saranjit, had remarked, cathartically, "how could it be argued now that the order included sch. E?"

C **[14]** It was for those reasons that we had dismissed these appeals on 13 May 2009.

D

E

F

G

H

I